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Ware Plumbing and Heating Co., Inc. and United Association of the Plumbing and Pipefitting Industry of the United States and Canada (AFL-CIO) Local Union No. 55. Case 8-CA-26585

May 24, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS
AND TRUESDALE

Upon a charge filed by the Union on July 28, 1994, the General Counsel of the National Labor Relations Board issued a complaint on November 30, 1994, against Ware Plumbing and Heating Co., Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. Although the Respondent filed an answer on December 6, 1994, the Respondent withdrew its answer on April 25, 1995.

On May 1, 1995, the General Counsel filed a Motion for Summary Judgment with the Board. On May 2, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Respondent, on April 25, 1995, withdrew its answer, waived a hearing on issues placed in dispute by its answer, and stated that it would not contest any Motion for Summary Judgment. Such a withdrawal has the same effect as a failure to file an answer, i.e., the allegations in the complaint must be considered to be admitted to be true.¹

Although the General Counsel's motion indicates that the Respondent is undergoing reorganization under Chapter 11 of the Bankruptcy Code, it is well established that the institution of bankruptcy proceedings

does not deprive the Board of jurisdiction or authority to entertain and process an unfair labor practice case to its final disposition. *Phoenix Co.*, 274 NLRB 995 (1985). Board proceedings fall within the exception to the automatic stay provisions for proceedings by a governmental unit to enforce its police or regulatory powers. See *id.*, and cases cited therein.

Accordingly, based on the withdrawal of the Respondent's answer to the complaint, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, with an office and place of business in Cleveland, Ohio, has been engaged as a residential and commercial plumbing contractor. At all material times Cleveland Plumbing Contractors (the Association), consisting of approximately 30 members, has been an organization composed of various employers engaged in the construction industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. At all material times the Respondent has been a member of the Association and has authorized the Association to represent it in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. Annually, the members of the Association collectively perform work valued in excess of \$50,000 for entities such as the Ford Motor Company, which themselves are engaged in commerce on other than an indirect basis. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen plumbers who are engaged in the work described on page one of the "Residential Agreement:" Plumbing, Heating, Solar Heating, Air Conditioning, Refrigeration, and Site Work in a single family residence or a single family residential development under one roof, regardless of fixtures or cost, garden type apartments, residential building or developments which do not exceed four (4) stories in height, regardless of dwelling units, (congregate living and nursing homes as in the current Agreement as long as the

¹ See *Maislin Transport*, 274 NLRB 529 (1985).

total fixtures do not exceed 450 fixtures counting floor drains), and motels up to four (4) stories, recreational complexes in connection with any of the foregoing, also repair, service, alterations, rehabilitation or additions to any of the above mentioned work.

Since about May 1, 1994, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since May 1, 1994, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 1, 1994, to April 30, 1997.

Since on or about January 29, 1994, the Respondent has failed and refused to make payments to the Union's health and welfare and pension funds, and other payments including dues and assessments, as required by the collective-bargaining agreement described above. These subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by failing, since about January 29, 1994, to make contractually required contributions to the Union's health and welfare and pension funds, we shall order the Respondent to make whole its unit employees by making all such delinquent contributions, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971),

with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²

Furthermore, having found that the Respondent violated Section 8(a)(5) and (1) by failing to make payments to the Union, since about January 29, 1994, for dues and assessments, as required by the collective-bargaining agreement, we shall order the Respondent to make such payments to the Union as required by the agreement, with interest as prescribed in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Ware Plumbing and Heating Co., Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to make payments to the health and welfare and pension funds of the United Association of the Plumbing and Pipefitting Industry of the United States and Canada (AFL-CIO) Local Union No. 55, or other payments including dues and assessments, as required by the collective-bargaining agreement between the Union and the Cleveland Plumbing Contractors, the most recent of which is effective from May 1, 1994, to April 30, 1997, for the following unit employees:

All journeymen plumbers who are engaged in the work described on page one of the "Residential Agreement:" Plumbing, Heating, Solar Heating, Air Conditioning, Refrigeration, and Site Work in a single family residence or a single family residential development under one roof, regardless of fixtures or cost, garden type apartments, residential building or developments which do not exceed four (4) stories in height, regardless of dwelling units, (congregate living and nursing homes as in the current Agreement as long as the total fixtures do not exceed 450 fixtures counting floor drains), and motels up to four (4) stories, recreational complexes in connection with any of the foregoing, also repair, service, alterations, rehabilitation or additions to any of the above mentioned work.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

²To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

total fixtures do not exceed 450 fixtures counting floor drains), and motels up to four (4) stories, recreational complexes in connection with any of the foregoing, also repair, service, alterations, rehabilitation or additions to any of the above mentioned work.

Since about May 1, 1994, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since May 1, 1994, the Union has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from May 1, 1994, to April 30, 1997.

Since on or about January 29, 1994, the Respondent has failed and refused to make payments to the Union's health and welfare and pension funds, and other payments including dues and assessments, as required by the collective-bargaining agreement described above. These subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purposes of collective bargaining.

CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

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(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

² To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

(a) Make contractually required contributions to the Union's health and welfare and pension funds, and such payments to the Union for dues and assessments, as required by the collective-bargaining agreement, which have not been made since about January 29, 1994, and make the employees whole for any expenses incurred as a result of the failure to make such payments, in the manner set forth in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Cleveland, Ohio, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. May 24, 1995

William B. Gould IV, Chairman

James M. Stephens, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to make payments to the health and welfare and pension funds of the United Association of the Plumbing and Pipefitting Industry of the United States and Canada (AFL-CIO) Local Union No. 55, or other payments including dues and assessments, as required by the collective-bargaining agreement between the Union and the Cleveland Plumbing Contractors, the most recent of which is effective from May 1, 1994, to April 30, 1997, for the following unit employees:

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WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make contractually required contributions to the Union's health and welfare and pension funds, and such payments to the Union for dues and assessments, as required by the collective-bargaining agreement, which have not been made since about January 29, 1994, and make the employees whole for any expenses resulting from our failure to make such payments, with interest.

WARE PLUMBING AND HEATING CO.,
INC.